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2
3 UNITED STATES DISTRICT COURT
4 EASTERN DISTRICT OF WASHINGTON
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6 JEANIE MARIE THOMPSON,

7 Plaintiff,

8 v.

9 COMMISSIONER OF SOCIAL

10 SECURITY,

11 Defendant.
12
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14
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No. 2:16-cv-00166-SAB

**ORDER DENYING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT;
GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT**

16 Before the Court are Plaintiff's Motion for Summary Judgment, ECF No.
17 13, and Defendant's Motion for Summary Judgment, ECF No. 14. The motions
18 were heard without oral argument. Plaintiff is represented by Michael G.
19 Thompson, and Defendant is represented by Assistant United States Attorney
20 Timothy M. Durkin and Special Assistant United States Attorney Justin L. Martin.
21 For the reasons set forth below, the Court **denies** Plaintiff's motion, and **grants**
22 Defendant's motion.

23 **Jurisdiction**

24 On August 17, 2012, Plaintiff filed an application for disability insurance
25 benefits. Plaintiff alleged an onset date of January 7, 2008. Plaintiff, with the
26 advice of counsel, amended her alleged disability onset date to February 1, 2011.

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1 Plaintiff's application was denied initially on October 2, 2012, and on
2 reconsideration on February 14, 2013. On September 4, 2014, Plaintiff appeared
3 and testified at a hearing held in Spokane, Washington before Administrative Law
4 Judge (ALJ) Marie Palachuk. The ALJ issued a decision on November 4, 2014,
5 finding that Plaintiff was not disabled as defined by the Social Security Act.
6 Plaintiff timely requested review by the Appeals Council, which denied the request
7 on March 30, 2016. The Appeals Council's denial of review makes the ALJ's
8 decision the final decision of the Commissioner.

9 Plaintiff filed a timely appeal with the United States District Court for the
10 Eastern District of Washington on May 23, 2016. The matter is before this Court
11 pursuant to 42 U.S.C. § 405(g).

12 Sequential Evaluation Process

13 The Social Security Act defines disability as the "inability to engage in any
14 substantial gainful activity by reason of any medically determinable physical or
15 mental impairment which can be expected to result in death or which has lasted or
16 can be expected to last for a continuous period of not less than twelve months." 42
17 U.S.C. § 423(d)(1)(A). A claimant shall be determined to be under a disability only
18 if her impairments are of such severity that the claimant is not only unable to do
19 her previous work, but cannot, considering claimant's age, education, and work
20 experiences, engage in any other substantial gainful work which exists in the
21 national economy. 42 U.S.C. § 423(d)(2)(A).

22 The Commissioner has established a five-step sequential evaluation process
23 for determining whether a person is disabled. 20 C.F.R. § 404.1520(a)(4); *Bowen*
24 *v. Yuckert*, 482 U.S. 137, 140-42 (1987).

25 Step 1: Is the claimant engaged in substantial gainful activities? 20 C.F.R.
26 § 404.1520(b). Substantial gainful activity is work done for pay and requires
27 compensation above the statutory minimum. 20 C.F.R. § 404.1574; *Keyes v.*
28 *Sullivan*, 894 F.2d 1053, 1057 (9th Cir. 1990). If the claimant is engaged in

1 substantial activity, benefits are denied. 20 C.F.R. § 404.1571. If she is not, the
2 ALJ proceeds to step two.

3 Step 2: Does the claimant have a medically-severe impairment or
4 combination of impairments? 20 C.F.R. § 404.1520(c). If the claimant does not
5 have a severe impairment or combination of impairments, the disability claim is
6 denied. A severe impairment is one that lasted or must be expected to last for at
7 least 12 months and must be proven through objective medical evidence. 20 C.F.R.
8 § 404.1509. If the impairment is severe, the evaluation proceeds to the third step.

9 Step 3: Does the claimant's impairment meet or equal one of the listed
10 impairments acknowledged by the Commissioner to be so severe as to preclude
11 substantial gainful activity? 20 C.F.R. § 404.1520(d); 20 C.F.R. § 404 Subpt. P.
12 App. 1. If the impairment meets or equals one of the listed impairments, the
13 claimant is conclusively presumed to be disabled. *Id.* If the impairment is not one
14 conclusively presumed to be disabling, the evaluation proceeds to the fourth step.

15 Before considering Step 4, the ALJ must first determine the claimant's
16 residual functional capacity (RFC). 20 C.F.R. § 404.1520(e). An individual's RFC
17 is her ability to do physical and mental work activities on a sustained basis despite
18 limitations from her impairments.

19 Step 4: Does the impairment prevent the claimant from performing work she
20 has performed in the past? 20 C.F.R. § 404.1520(f). If the claimant can perform
21 her previous work, she is not disabled. *Id.* If the claimant cannot perform this
22 work, the evaluation proceeds to the fifth and final step.

23 Step 5: Is the claimant able to perform other work in the national economy
24 in view of her age, education, and work experience? 20 C.F.R. § 404.1520(g).

25 The initial burden of proof rests upon the claimant to establish a prima facie
26 case of entitlement to disability benefits. *Tackett v. Apfel*, 108 F.3d 1094, 1098 (9th
27 Cir. 1999). This burden is met once a claimant establishes that a physical or mental
28 impairment prevents her from engaging in her previous occupation. *Id.* At step

1 five, the burden shifts to the Commissioner to show that the claimant can perform
2 other substantial gainful activity. *Id.*

3 **Standard of Review**

4 The Commissioner's determination will be set aside only when the ALJ's
5 findings are based on legal error or are not supported by substantial evidence in the
6 record. *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992) (citing 42 U.S.C.
7 § 405(g)). Substantial evidence is "more than a mere scintilla," *Richardson v.*
8 *Perales*, 402 U.S. 389, 401 (1971), but "less than a preponderance." *Sorenson v.*
9 *Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). Substantial evidence is
10 "such relevant evidence as a reasonable mind might accept as adequate to support a
11 conclusion." *Richardson*, 402 U.S. at 401. The Court must uphold the ALJ's denial
12 of benefits if the evidence is susceptible to more than one rational interpretation,
13 one of which supports the decision of the ALJ. *Batson v. Comm'r, Soc. Sec.*
14 *Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004). The Court reviews the entire record.
15 *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985). "If the evidence can support
16 either outcome, the court may not substitute its judgment for that of the ALJ."
17 *Matney*, 981 F.2d at 1019.

18 A decision supported by substantial evidence will be set aside if the proper
19 legal standards were not applied in weighing the evidence and making the decision.
20 *Browner v. Sec'y of Health & Human Servs.*, 839 F.2d 432, 433 (9th Cir. 1988).
21 An ALJ is allowed "inconsequential" errors as long as they are immaterial to the
22 ultimate nondisability determination. *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d
23 1050, 1055 (9th Cir. 2006).

24 **Statement of Facts**

25 The facts have been presented in the administrative transcript, the ALJ's
26 decision, and the briefs to this Court; only the most relevant facts are summarized
27 here. At the time of the hearing, Plaintiff was fifty-seven years old. Plaintiff is
28 married and does not have any children under the age of eighteen. She lives in a

1 home with her husband of over thirty-three years, has a high school education, and
2 can read. Plaintiff owned and managed a business before closing it. Following that,
3 she worked as a census taker, assistant manager, and bookkeeper.

4 While working as an assistant manager Plaintiff injured her left shoulder.
5 The injury, cumulative in nature, occurred on the job while loading fifty-pound
6 feed sacks on January 7, 2008. Following the injury, Plaintiff had three surgeries
7 on her left shoulder. Eugene Pontecorvo, D.O., orthopedic surgeon and Plaintiff's
8 treating physician, performed all three left shoulder surgeries on Plaintiff, the last
9 of which was conducted in 2010.

10 On September 9, 2012, Plaintiff made the following representations, among
11 others, in a Social Security Administration Function Report: (1) Plaintiff is right
12 hand dominant; (2) Plaintiff is in pain due to her left shoulder injury; (3) Plaintiff's
13 pain partially inhibits her ability to perform household chores; (4) Plaintiff's pain
14 partially inhibits her ability to perform workplace duties; (5) Plaintiff's pain limits
15 her to approximately nine holes of golf rather than eighteen; (6) Plaintiff is able to
16 garden and perform outdoor tasks such as raking, shoveling, and harvesting; (7)
17 Plaintiff is able to prepare basic meals and groom without assistance, daily; (8)
18 Plaintiff is able to socialize weekly with friends; (9) Plaintiff is able to pay bills;
19 (10) Plaintiff hired house cleaners to help with household chores. Tr. 196-202. At
20 the hearing, Plaintiff testified that she experiences pain in her neck, headaches,
21 dizziness, and numbness in both hands. Tr. 196-203. She has also been taking
22 antidepressants for several years. Tr. 55

23 Treatment notes from Dr. Pontecorvo dated June and August 2012 indicate
24 that Plaintiff had some difficulty completing daily activities and problems sleeping,
25 but her "situation [was] stable," as she maintained full range of motion, full muscle
26 strength, and was swimming and exercising. Tr. 16, 358-59. Three months later, in
27 November 2012, Dr. Pontecorvo again noted that Plaintiff was swimming and
28 exercising and gaining range of motion "as we speak." Tr. 16, 497.

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At step two, the ALJ found Plaintiff has the following severe impairments: left shoulder impingement syndrome, osteoarthritis of the left shoulder AC joint, left elbow tendinopathy, and degenerative disc disease of the cervical spine. Tr. 13-14. Plaintiff's major depressive disorder and anxiety disorder were not found to be severe Tr. 14.

The ALJ concluded that Plaintiff has the RFC to perform light work as defined in 20 CFR 404.1567(b) except she can only occasionally push/pull and/or reach overhead with the left upper extremity. However, she can reach in all other directions frequently. She is precluded from working at unprotected heights such as with ropes, ladders, and scaffolding. She must avoid concentrated exposure to vibration and other hazards such as dangerous moving machinery/equipment.

In the alternative, at step five, the ALJ found Plaintiff was not disabled on the basis that she could perform other work which exists in significant numbers in the national economy, including positions such as hotel desk clerk. Tr. 21.

1. Whether the ALJ properly evaluated Plaintiff's credibility.

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2. Whether the ALJ properly evaluated the medical opinion evidence of (a) Malcolm Brahms, M.D., and (b) Jay Schmauch, D.O.
3. Whether the ALJ properly determined Plaintiff's RFC.

Discussion

1. Whether the ALJ properly evaluated Plaintiff's credibility.

An ALJ's assessment of a claimant's credibility is entitled to "great weight." *Anderson v. Sullivan*, 914 F.2d 1121, 1124 (9th Cir. 1990). When there is no evidence of malingering, the ALJ must give "specific, clear and convincing reasons" for rejecting a claimant's subjective symptom testimony. *Molina v. Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012) (citation omitted). If the ALJ's credibility finding is supported by substantial evidence in the record, the reviewing court "may not engage in second-guessing." *Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002).

In recognition of the fact that an individual's symptoms can sometimes suggest a greater level of severity of impairment than can be shown by the objective medical evidence alone, 20 C.F.R. §§ 404.1529(c) and 416.929(c) describe the kinds of evidence, including the factors below, that the ALJ must consider in addition to the objective medical evidence when assessing the credibility of an individual's statements:

1. The individual's daily activities;
2. The location, duration, frequency, and intensity of the individual's pain or other symptoms;
3. Factors that precipitate and aggravate the symptoms;
4. The type, dosage, effectiveness, and side effects of any medication the individual takes or has taken to alleviate pain or other symptoms;
5. Treatment, other than medication, the individual receives or has received for relief of pain or other symptoms;
6. Any measures other than treatment the individual uses or has used to relieve pain or other symptoms (*e.g.*, lying flat on his or her back, standing for 15 to 20 minutes every hour, or sleeping on a board); and
7. Any other factors concerning the individual's functional limitations and restrictions due to pain or other symptoms.

1 SSR 16-3P, 2016 WL 1119029.

2 Daily activities may be grounds for an adverse credibility finding if (1)
3 Plaintiff's activities contradict his or her other testimony, or (2) Plaintiff "is able to
4 spend a substantial part of his day engaged in pursuits involving the performance
5 of physical functions that are transferable to a work setting." *Orn v. Astrue*, 495
6 F.3d 625, 639 (9th Cir. 2007) (citing *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir.
7 1989))

8 The ALJ found Plaintiff only partially credible. In the opinion, the ALJ
9 found that (1) Plaintiff's symptoms were not as significant as alleged; (2)
10 Plaintiff's daily activities demonstrated she was more capable than alleged; (3)
11 Plaintiff continues to work as a bookkeeper on a part-time basis despite her
12 complaints of disabling limitations; and (4) Plaintiff's subjective complaints were
13 inconsistent with findings by doctors.

14 The ALJ's reasons to discredit Plaintiff's testimony meet the specific, clear,
15 and convincing standard for the following reasons. First, the ALJ reasonably found
16 that Plaintiff's symptoms were not as significant as alleged. Tr. 19. For example,
17 physical examinations and diagnostic imaging indicated that Plaintiff's "situation
18 [was] stable," as she maintained nearly full range of motion and had full muscle
19 strength. Tr. 16, 18, 358-59. The objective medical evidence, or lack thereof, is an
20 important factor to consider in determining credibility. *Bray v. Comm'r of Soc.*
21 *Sec. Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009) (upholding credibility finding
22 where ALJ found that claimant's "statements at her hearing do not comport with
23 objective evidence in her medical record").

24 Second, the ALJ reasonably found that Plaintiff's daily activities
25 demonstrated she was more capable than alleged. Tr. 19. Daily activities that are
26 inconsistent with a claimant's alleged symptoms are relevant to the ALJ's
27 symptom evaluation. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001).
28 Even where daily activities "suggest some difficulty functioning, they may be

1 grounds for discrediting the claimant’s testimony to the extent they contradict
2 claims of a totally debilitating impairment.” *Molina*, 674 F.3d at 1113. The Ninth
3 Circuit has “warned that ALJs must be especially cautious in concluding that daily
4 activities are inconsistent with testimony about pain, because impairments that
5 would unquestionably preclude work and all the pressures of a workplace
6 environment will often be consistent with doing more than merely resting in bed all
7 day.” *Garrison v. Colvin*, 759 F.3d 995, 1016 (9th Cir. 2014). Recognizing that
8 claimants should not be penalized for attempting to lead their normal lives, “only if
9 Plaintiff’s level of activity is inconsistent with his claimed limitations would these
10 activities have any bearing on his credibility.” *Id.*

11 Here, Plaintiff reported that before her surgeries she could do eighteen holes
12 of golf, but after her surgeries she could “hardly do nine” holes of golf. Tr. 200.
13 Even the act of attempting to play a round of golf, let alone nearly reaching nine
14 holes, is dubiously inconsistent with a debilitating shoulder disability. Also, her
15 treatment notes indicate that she engages in strenuous physical activities such as
16 swimming and lifting weights, despite her claims of disabling problems with her
17 upper extremity. Tr. 19, 359, 497. Plaintiff’s counsel rebutted by pointing out that
18 Dr. Pontecorvo’s notes indicated that “she really got some burn” by engaging in
19 the above-mentioned activities—this does not, however, imply that she was
20 incapable of doing them. Tr. 359. Accordingly, the ALJ reasonably concluded
21 that Plaintiff’s activities of daily living were inconsistent with her allegations of
22 disabling limitations. Tr. 19.

23 Third, the ALJ noted that Plaintiff continues to work as a bookkeeper on a
24 part-time basis despite her complaints of disabling limitations. Tr. 13, 19, 162-67.
25 A claimant’s subjective allegations may be discredited by evidence of employment
26 regardless of whether it rose to the level of substantial gainful activity. *See* 20
27 C.F.R. § 404.1571 (“Even if the work you have done was not substantial gainful
28 activity, it may show that you are able to do more work than you actually did.”). It

1 was reasonable for the ALJ to conclude that Plaintiff's ability to perform some
2 work activities after her alleged onset date suggests that her impairments are not as
3 significant as alleged. Tr. 19.

4 Fourth, the ALJ determined that Plaintiff's subjective complaints were
5 inconsistent with the findings by doctors regarding her workers' compensation
6 claims before the Washington State Department of Labor and Industries. Tr. 19.
7 The Department concluded that Plaintiff had a fifteen to twenty percent permanent
8 partial disability rating. Tr. 306-50, 480-93. Plaintiff disputes the propriety of this
9 finding. However, Social Security regulations determine that "disability or
10 blindness determination [is] based on social security law." Consequently,
11 determinations made by other agencies are not binding. 20 C.F.R. § 404.1504,
12 416.904. Nonetheless, it was appropriate for the ALJ to consider this finding, as it
13 is consistent with substantial evidence in the record. Thus, Plaintiff's claim that the
14 ALJ failed to appreciate the distinctions between permanent total disability and
15 permanent partial disability is inconsequential.

16 Accordingly, the ALJ's credibility finding is not error as their reasoning is
17 specific, clear, and convincing and consistent with substantial evidence in the
18 record.

19 *2. Whether the ALJ properly evaluated the medical opinion evidence of (a)*
20 *Malcolm Brahms, M.D., and (b) Jay Schmauch, D.O.*

21 The ALJ is tasked with resolving conflicts in the medical evidence. *Andrews*
22 *v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). Three types of doctors provide
23 medical evidence: treating doctors, examining doctors, and reviewing (non-
24 examining) doctors. For cases filed before March 27, 2017, the Social Security
25 Administration favors the opinion of a treating physician over non-treating
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1 physicians. 20 C.F.R. § 416.927¹; *Orn*, 495 F.3d at 631. “If a treating physician’s
2 opinion is well-supported by medically acceptable clinical and laboratory
3 diagnostic techniques and is not inconsistent with the other substantial evidence in
4 the case record, it will be given controlling weight.” *Orn*, 495 F.3d at 631. If a
5 treating physician’s opinion is not given “controlling weight” because it does not
6 meet these requirements, the ALJ should consider (i) the length of the treatment
7 relationship and the frequency of examination by the treating physician; and (ii)
8 the nature and extent of the treatment relationship between the patient and the
9 treating physician in determining the weight it will be given. *Id.* “[A]n ALJ errs
10 when he rejects a medical opinion or assigns it little weight while doing nothing
11 more than ignoring it, asserting without explanation that another medical opinion is
12 more persuasive, or criticizing it with boilerplate language that fails to offer a
13 substantive basis for his conclusion.” *Garrison*, 759 F.3d at 1012–13 (citing
14 *Nguyen v. Chater*, 100 F.3d 1462, 1464 (9th Cir. 1996)).

15 By rule then the Social Security Administration favors the opinion of a
16 treating physician over non-treating physicians. 20 C.F.R. § 416.927; *Orn*, 495
17 F.3d at 631. Where contradicted, the ALJ may reject the opinion of a treating
18 physician for specific and legitimate reasons that are supported by substantial
19 evidence in the record. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). When
20 an ALJ fails to provide adequate reasons to reject a treating or examining doctor’s

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22 ¹ 20 C.F.R. § 416.927(c)(2) states: Generally, we give more weight to opinions
23 from your treating sources, since these sources are likely to be the medical
24 professionals most able to provide a detailed, longitudinal picture of your medical
25 impairment(s) and may bring a unique perspective to the medical evidence that
26 cannot be obtained from the objective medical findings alone or from reports of
27 individual examinations, such as consultative examinations or brief
28 hospitalizations.

1 opinion, the opinion may be credited as a matter of law. *Garrison*, 759 F.3d at
2 1012.

3 Here, Plaintiff argues that the ALJ improperly evaluated the opinions of
4 Malcolm Brahms, M.D. and Jay Schmauch, D.O. ECF No. 13 at 11-18. The ALJ
5 properly considered and weighed all the medical opinion evidence of record and
6 formulated an RFC finding that is consistent with the credible limitations.

7 a. Malcolm Brahms, M.D.

8 Dr. Brahms is a licensed orthopedic surgeon and testified as a medical expert
9 at Plaintiff's administrative hearing. Tr. 36-47. The ALJ gave Dr. Brahms' opinion
10 significant weight because it is consistent with the clinical and objective medical
11 findings in the record. Tr. 18. Plaintiff claims that Dr. Brahms' testimony is
12 contradicted by five other examining physicians. Contradiction is present, but only
13 in one of Dr. Brahms' many observations – that “[t]here was still a slight degree of
14 limited motion, but [Plaintiff's] signs and symptoms were ‘markedly improved’
15 starting in August 2012.” ECF No. 13 at 11-15. The contradiction here is
16 immaterial to the outcome of the ALJ decision because the ALJ did not reject a
17 treating or examining doctor's opinion.

18 First, Plaintiff's treatment notes from her own surgeon, Dr. Pontecorvo,
19 support Dr. Brahms' observation that her condition improved in August 2012.
20 Such notes dated June and August 2012 indicate that Plaintiff had some difficulty
21 completing daily activities and problems sleeping, but her “situation [was] stable,”
22 as she maintained full range of motion and full muscle strength. Tr. 16, 358-59.
23 Three months later, in November 2012, Dr. Pontecorvo again noted that Plaintiff
24 was improving. Tr. 16, 497. Plaintiff contends that the negative examination
25 findings from Dr. Kopp, Dr. Anderson, Dr. Bowton, Dr. Pontecorvo, and Dr.
26 Trevino negate the findings of Dr. Brahms' opinion. ECF No. 13 at 11-15. Yet,
27 there is no dispute that Plaintiff's left shoulder condition improved and that other
28 negative physical conditions remained after August 2012. Such negative and

1 positive findings are not mutually exclusive. The ALJ is right to incorporate, and
2 note, that the negative findings do not undermine Dr. Brahms' observation that
3 Plaintiff's condition improved in August 2012.

4 Second, Plaintiff's argument is immaterial. It is a "settled rule that [courts]
5 will not reverse for errors that are inconsequential to the ultimate nondisability
6 determination." *Molina v. Astrue*, 674 F.3d 1104, 1117 (9th Cir. 2012). Whether
7 Plaintiff's physical condition improved in August 2012 is not dispositive. The
8 pertinent question is whether Plaintiff has disability, not whether Plaintiff is or is
9 not improving. The ALJ gave significant weight to Dr. Brahms' opinion because it
10 was "consistent with the clinical and objective medical findings in the record" and,
11 therefore, was entitled to significant weight. Tr. 18. The ALJ thoroughly
12 considered all of the medical evidence, including the combination of positive and
13 negative examination findings, and reasonably determined that, on balance, the
14 record evidence did not establish disabling physical limitations.

15 b. Jay Schmauch, D.O.

16 Dr. Schmauch examined Plaintiff once in April 2012 and prepared a report.
17 Tr. 471-73. Dr. Schmauch noted that Plaintiff complained of helplessness and
18 hopelessness, crying spells, thoughts of past abuse, and panic attacks; he also
19 reported adequate sleep and appetite, and that she enjoyed scrapbooking and
20 visiting with friends. Dr. Schmauch consequently opined that Plaintiff was
21 suffering from major depressive disorder, chronic, recurrent, and an anxiety
22 disorder, otherwise not specified. Tr. 471-76. The ALJ listed several reasons for
23 giving Dr. Schmauch's opinion "little" weight: (1) it was limited in scope and
24 information; (2) it was not informed by a review of Plaintiff's prior mental health
25 records; (3) it did not reveal significant complaints of mental health problems or
26 symptoms; and (4) it did not reveal any limitations related to mental health. Tr. 17.
27 The ALJ was right to consider several factors in evaluating medical opinion
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1 evidence in this case and did not act unreasonably when she gave Dr. Schmauch's
2 opinion little weight.

3 Plaintiff argues that the ALJ erred by giving more weight to the opinion of
4 Dr. Pontecorvo, her treating surgeon, because Dr. Pontecorvo does not specialize
5 in mental health. Specialization is just one of several factors that ALJs must
6 consider in evaluating medical opinion evidence. *See* 20 C.F.R. §§ 404.1527(c)(1)-
7 (6). ALJs can consider, for example, the length of the treatment relationship. *See*
8 20 C.F.R. §§ 404.1527(c)(2)(i). In this case, Dr. Pontecorvo had a long-standing
9 relationship with Plaintiff while Dr. Schmauch examined Plaintiff only once.

10 Additionally, a State agency physician, Andrew Forsyth, Ph.D., reviewed all
11 of the record evidence and concluded there was no evidence to support any
12 significant mental limitations. Tr. 90. He independently noted that Plaintiff did not
13 list any significant mental limitations that affected her daily activities. This
14 observation conforms with the medical record and Plaintiff's own representations.
15 Moreover, Plaintiff did not meet her burden of establishing prejudice from the
16 ALJ's decision. *See Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) ("the burden of
17 showing that an error is harmful normally falls upon the party attacking the
18 agency's determination"). Plaintiff did not identify the specific restrictions or
19 limitations that the ALJ should have included in their RFC finding. Instead,
20 Plaintiff makes a general claim that suggests "moderate" limitations. Such
21 limitations are not significantly probative, as the term "moderate" means "[y]our
22 functioning in this area independently, appropriately, effectively, and on a
23 sustained basis is far." 20 C.F.R. Pt. 404, Subpt. P, App. 1, at 12.00F2c; Revised
24 Medical Criteria for Evaluating Mental Disorders, 81 Fed. Reg. 66138-01, 66164
25 (Sept. 26, 2016) (to be codified 20 C.F.R. pts. 404, 416). Plaintiff has not pointed
26 to any mental limitations from Dr. Schmauch's opinion that the ALJ should have
27 accounted for in the RFC finding, and thus, Plaintiff cannot establish harmful error.

1 For the reasons stated above, the ALJ's evaluation of the medical opinion
2 evidence is supported by substantial evidence in the record.

3 *3. Whether the ALJ properly determined Plaintiff's RFC.*

4 The ALJ's determination of Plaintiff's RFC and finding that she could
5 perform past work and other work in the national economy are likewise supported
6 by substantial evidence in the record. The ALJ posed the following hypothetical to
7 the vocational expert:

8 [A]ssume an individual of the same age, education and work
9 experience as the claimant, having been born in 1957, she falls within
10 the advanced age category, and with a high school diploma, she falls
11 in the high school and above regulatory category. The individual has
12 the following limitations. . . . The first hypothetical, the individual is
13 limited to light work, pushing and pulling with the left upper
14 extremity is limited to occasional.

15 Overhead reaching with the left upper extremity is limited to
16 occasional. Reaching in all other directions with the left upper
17 extremity is limited to frequent. No ladders, ropes or scaffolds, and
18 avoid concentrated exposure to industrial vibration and to hazards,
19 such as dangerous moving machinery or unprotected heights.

20 Tr. 35-36. The vocational expert (VE) opined that such a worker could perform
21 Plaintiff's past work of survey worker, manager trainee, accounting clerk; although
22 such a worker could not operate a forklift as required of a manager trainee. Tr. 36.

23 Next, the ALJ posed the same hypothetical but added the additional
24 limitations, making the manipulative limitations bilateral and stating that such a
25 worker would not be able to maintain their head and neck in either a continuous
26 flexed or extended position. Tr. 36-37. The VE opined that such a worker could
27 only perform Plaintiff's past relevant work of manager trainee. Tr. 37.

28 Plaintiff contends that the ALJ committed reversible error by not carefully
considering Plaintiff's bilateral manipulative limitations. However, the ALJ
explicitly requested that the VE consider the limitations that are supported by the
record, including Plaintiff's claimed inability to bilaterally grab, hold and turn

1 objects. Thus, because the “hypothetical that the ALJ posed to the [vocational
2 expert] contained all of the limitations that the ALJ found credible and supported
3 by substantial evidence in the record,” the ALJ properly relied on the vocational
4 expert’s testimony to find that Plaintiff could perform her past relevant work as a
5 survey worker and manager trainee. Tr. 19-20; *Bayliss v. Barnhart*, 427 F.3d 1211,
6 1217-18 (9th Cir. 2005). Plaintiff has not pointed to any credible evidence that
7 would support greater limitations than the ALJ accounted for. Further, based in
8 part on the opinions of Dr. Pontecarvo, the treating physician, and Dr. Forsyth, the
9 ALJ reasonably concluded that the record evidence documenting Plaintiff’s mental
10 health treatment did not reveal any mental limitations. Tr. 17-18, 90, 497.

11 Moreover, there is nothing in the regulations that requires the ALJ to base a
12 Step Four finding on whether the claimant can perform the specific job that she
13 previously performed. ALJs can decide whether the claimant can perform “the
14 same kind of work as it is customarily performed throughout the economy.” Social
15 Security Ruling (SSR) 82-62. “If you can still do this kind of work, we will find
16 that you are not disabled.” 20 C.F.R. § 404.1520(e); *see also* SSR 82-61 (“a
17 claimant will be found ‘not disabled’ when it is determined that he or she retains
18 the RFC to perform [t]he actual functional demands and job duties of a particular
19 past relevant job; or [t]he functional demands and job duties of the occupation as
20 generally required by employers throughout the national economy.”) Here, the
21 vocational expert testified that Plaintiff could perform her past work as a survey
22 worker and a manager trainee. The vocational expert acknowledged that Plaintiff
23 “could not do the forklift portion” of the latter job as she performed it, but could
24 perform the functional demands and job duties of a manager trainee as generally
25 required by employers throughout the national economy. Tr. 67. The ALJ
26 reasonably relied on the testimony of the vocational expert. Tr. 19-20, 67.

27 After determining Plaintiff could perform her past relevant work at Step
28 Four, the ALJ made an alternative finding that Plaintiff could perform work as a

1 hotel desk clerk. Tr. 68. There are 217,000 hotel desk clerk jobs in the national
2 economy. Tr. 68-69. It is inconsequential if the vocational expert found one or
3 many jobs available as long as the number of jobs meets the significant number
4 required. Here, that number is 25,000 national jobs. The 217,000 jobs available
5 more than sufficiently meets this number. The ALJ properly determined that
6 Plaintiff could perform other work in the national economy.

7 **Conclusion**

8 The ALJ's determination was based upon substantial evidence in the record.
9 The ALJ provided specific, clear, and convincing reasons for not finding all of
10 Plaintiff's self-described symptoms to be fully credible. Likewise, the ALJ's
11 evaluation of medical opinion evidence is consistent with the record as a whole.
12 Accordingly, the ALJ properly determined Plaintiff's RFC and relied on the VE's
13 testimony to find Plaintiff capable of performing past relevant work. In sum, the
14 ALJ's determination was based on substantial evidence and was well within the
15 scope of deference which this Court must accord the ALJ.

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Accordingly, **IT IS HEREBY ORDERED:**

1. Plaintiff's Motion for Summary Judgment, ECF No. 13, is **DENIED**.

2. Defendant's Motion for Summary Judgment, ECF No. 14, is
GRANTED.

3. The District Court Executive is directed to enter judgment in favor of Defendant.

IT IS SO ORDERED. The District Court Executive is hereby directed to file this Order, provide copies to counsel, enter judgment, and close the file.

DATED this 13th day of September 2017.



Stanley A. Bastian

Stanley A. Bastian
United States District Judge